

ICEA Comments on Draft Part 455

Renewable Portfolio Standards and Clean Coal Standards for Alternative Retail Electric Suppliers and Utilities operating Outside Their Service Areas

The Illinois Competitive Energy Association (“ICEA”) and its members were active participants in the negotiations that led to the enactment of Public Act 96-0159 (SB 2150) which modified the renewable portfolio standards (“RPS”) that are to be applicable to alternative retail electric suppliers and electric utilities operating outside their service area (collectively “retail electric suppliers” or “RESs”).

ICEA was formed as an Illinois-based trade association whose mission is to foster the development of competitive retail energy markets in Illinois in order to bring the benefits of competitive supply to all customers, regardless of their energy supplier. ICEA is an Illinois not-for-profit corporation organized under the laws of the State of Illinois. The President of ICEA is Kevin K. Wright, a former Chairman and Commissioner of the Illinois Commerce Commission (“ICC” or “Commission”).

ICEA appreciates the efforts of the ORMD and the Staff of the Illinois Commerce Commission (“Staff”) to adopt rules to implement the RPS (and the Clean Coal Standard requirements) as they apply to RESs in Illinois under proposed Part 455. In large measure, the Staff draft rules mirror and repeat the applicable statutory provisions that relate to the RPS.

ICEA’s comments below will be organized by Section and Subsection for ease of review. The absence of a Comment on any one specific section or issue should not be construed as a lack of interest or concern related to such section or issue. For the convenience of the Staff, attached is a redline that contains ICEA’s suggested revisions to the proposed Rules.

A. 455.120 Annual Report of Compliance with Renewable Energy Portfolio Standard

ICEA has four (4) comments regarding this section.

First, ICEA does not believe that the Public Utilities Act (the “Act”) requires RESs to report the information sought in subsection 455.120(a)(4) regarding renewable energy credits (“RECs”) **not used to comply with the RPS**. Additionally, ICEA sees no valid basis in being ordered to provide such information regarding the banking of RECs, as it has no bearing on the RESs’ compliance with the RPS. In fact, the reporting of such information would result in the de facto production of commercially sensitive and competitively sensitive and proprietary information. If RESs are required to provide such information regarding their buying, trading, or REC procurement practices, such information must be afforded confidential treatment. The information is not only commercially sensitive as it relates to competitors in the retail market but also potential wholesale counterparties, which includes competitive wholesale suppliers, renewable developers, or others. Further, ICEA does not understand the applicability of the last sentence in subsection 455.120(a)(4) to the proposed banking information.

Second, ICEA has concerns regarding the confidential and proprietary information that must be included regarding grandfathered contracts in subsection 455.120(c). As an initial matter, consistent with the competitive sensitivities regarding information about banking and purchasing practices of RESs, if RESs or other market participants are allowed access to information regarding the length of the term(s) in retail contracts, the names of customers, and quantities of electricity associated with each such contract (and possibly other contractual terms and conditions) confidential and proprietary information would be available in the public domain. As a result, ICEA contends that such information must be afforded de facto confidential and proprietary treatment under the applicable Commission Rules. It is ICEA's belief and understanding that most RESs are under a contractual obligation to keep the identity of individual customers confidential. Furthermore, the Act imposes an affirmative obligation on RESs to keep customer usage and account information confidential absent express authorization from the customer. 220 ILCS 5/16-122 and 83 Ill. Adm. Code 451.40(b). Proposed subsection 455.120(c) would expressly violate this statutory provision and existing administrative rule. Regardless of whether the Commission agrees to afford such submission confidential treatment, it would be more consistent to utilize ComEd and Ameren Account Numbers instead of customer names when reporting such information. Since the relationship between RESs and ComEd/Ameren is driven by Account Numbers and not Customer Names, ICEA believes that this would allow the Staff to be provided with the same basic information that is seeks to ensure compliance with the grandfathered existing contracts.

Third, ICEA recommends that until the Illinois Power Agency ("IPA") creates the required list of qualifying renewable energy resources pursuant to Section 16-115D(a)(4), any RECs purchased within the PJM and MISO footprint should be deemed to be from qualifying renewable resources for RPS compliance. This ensures that any RECs purchased for RPS compliance prior to the IPA providing its list to M-RETS or GATS will not be disqualified, thereby creating a non-compliance issue for a supplier that took steps to fulfill its obligation. Until the IPA fulfills its statutory obligation, RESs, M-RETS, GATS, and the ICC have no confirmation of what will qualify as a renewable resource for compliance purposes. Accordingly, the ICC has no ability to enforce compliance of a qualifying REC, and RESs will have only a generic REC banking statement, which is not specific to the RPS requirements.

Finally, consistent with other provisions of the Commission's Rules and other Code Parts that apply to RESs and others, ICEA recommends that a new provision regarding Confidentiality be added as Subsection 455.120(f).

B. 455.140 Record Retention

ICEA questions the appropriateness of imposing a new thirty-six (36) month requirement in Subsection 455.140(a) upon RESs to maintain original records of all contracts and bills as it relates to compliance with the new RPS requirements. This 36 month requirement is in excess of long-standing record retention requirements imposed upon RESs under 83 Ill. Adm. Code 451.40. ICEA recommends that Subsection 455.140(a) record retention requirements be for a period of twenty-four (24) months, consistent with requirements under Part 451 of the Illinois Administrative Code.

C. 455.160 Other Commission Proceedings

ICEA questions the appropriateness of the broad right for “an interested party” to petition for some form of Commission investigation as proposed in subsection 455.160(a). As has been seen with certain other matters before the Commission, a process should not be created that allows entities to use this provision to seek competitively sensitive confidential and proprietary information about a competitor, or to otherwise impact a competitor’s business for the purpose of gaining a competitive advantage. If this provision is narrowly tailored to only allow the Commission or any Statutory Consumer Advocate to initiate such a proceeding, that would be more appropriate.

While ICEA supports the recognition in proposed Subsection 455.160(b) of the need for a RES to be able to seek a refund of any alternative compliance payments, it would be helpful if the Commission (and/or the IPA) provided some additional details regarding the type of process that is envisioned to effectuate this provision.

Finally, the proposed RPS Rules fail to address certain requirements regarding consideration of the applicability of any federal RPS as outlined in Section 16-115D(d)(5) of the Act. 220 ILCS 5/16-115D(d)(5). ICEA recommends the inclusion of language that is consistent with the Act on this issue.

D. Ability to Seek a Waiver of Compliance

ICEA suggests the inclusion of a new provision (455.100 and 455.130(h)) that would address a supplier’s ability to seek a waiver of the applicable RPS and Alternative Compliance Payment (“ACP”). Such a provision would be consistent with the ability to seek waivers of other Commission Rules and Regulations.

E. Annual RPS Compliance Report Spreadsheet

ICEA suggests that the calculation of the percentage of wind and solar (beginning in 2015) REC minimum does not properly reflect the Act whenever the percentage of RECs used for compliance is less than the maximum of 50%. Under the Act, RESs can elect to utilize RECs in place of an ACP for a range of their requirement not to exceed 50%. ICEA agrees that when the maximum of 50% is met via RECs that the Act requires that a minimum of 60% must be wind and that 6% must be solar beginning in 2015. However, if the RES elects use 20% or less (17% beginning in 2015 when there is a 6% solar requirement) of its requirement via RECs (or 40% of the 50% eligible for REC compliance) then that 20% can be from any source eligible under the Act and the wind requirement is met via the additional ACP payment for the remaining 30%.

F. Compliance with Clean Coal Standards Requirements

As an initial matter, Section 455.200, the Applicability of Subpart C, should be revised to reflect the fact that any compliance requirements associated with the Clean Coal Standards are contingent upon the adoption of enabling legislation as outlined in the Clean Coal Portfolio Standards Act. 20 ILCS 3855/1-75(d)(4)(iii).

With respect to the proposed Reporting requirements contained in subsection 455.210(a), ICEA has five (5) comments.

First, the proposed Rules fail to provide a process or describe how each RES is going to know how much electricity it is required to purchase from the initial clean coal facility. ICEA suggests that the Commission develop a process similar to that utilized by the Commission for determination of the annual contribution to Energy Efficiency Trust Fund. Under that process, based upon the Annual kWh Report that is filed by March 1 of every year pursuant to 83 Ill. Adm. Code 451.770, the Commission Staff sends each RES a proposed calculation of the required contribution. The RES is required to certify that it agrees with the calculation and then is sent an invoice from the Illinois Department of Revenue. A similar process could be utilized to determine the appropriate pro rata share for each RES, ComEd, and Ameren to ensure compliance with this requirement. ICEA notes that whatever process the Commission Staff utilizes will have to be consistent with the period of time and manner in which the pro rata share for ComEd and Ameren are determined.

Second, since the Clean Coal Portfolio Standards Act does not require a RES to purchase electricity from the initial clean coal facility until it is operational, Section 455.210(b) should be revised to reflect this fact. 20 ILCS 3855/1-75(d)(3)(c)(ix). Otherwise, the Commission will be requiring RESs to spend the time and resources to make a compliance filing that will be of little or no value and a complete waste of time.

Third, and directly related to the preceding comment, the introductory language in subsection 455.210(c) should mirror the introductory language in 455.210(b) so that it is tied to the “earliest September 1” in the year in which the initial clean coal facility begins to generate electricity. 20 ILCS 3855/1-75(d)(3)(c)(ix).

Fourth, the proposed Rules do not address a situation in which a RES enters the marketplace during the calendar year. Under such a situation would “New RES” be absolved from any compliance obligation? If so, is that fair and equitable? Could that lead to potential “gaming”?

Fifth, subsection 455.200, for the same reasons as those articulated above for subsection 455.100, should include separate sections on confidentiality and waivers of compliance.